BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS HARLAN Claimant	)	
VS.	)	
USF HOLLAND, INC. Respondent	)	Docket No. 1,054,886
AND	)	
OLD REPUBLIC INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 24, 2012, Award entered by Special Administrative Law Judge Jerry Shelor. The Board heard oral argument on January 23, 2013. Matthew L. Bretz, of Hutchinson, Kansas, appeared for claimant. John R. Emerson, of Kansas City, Kansas, appeared for respondent.

The Special Administrative Law Judge (SALJ) found that claimant had an average weekly wage (AWW) of $232 and a 10 percent functional impairment to the body as a whole. The SALJ awarded claimant a work disability of 91.6 percent.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent contends claimant failed to prove he suffered permanent functional impairment as a result of the February 3, 2011, accident. In the event the Board finds claimant suffered permanent functional impairment, respondent argues claimant failed to prove he suffered a task loss as a result of this injury. Respondent contends Dr. Jackson's 0 percent task loss opinion is more credible than the opinion of Dr. Murati. Respondent

also contends Dr. Barnett's task list was incomplete and claimant failed to testify whether the task list was valid or complete. Respondent asserts, further, the SALJ improperly determined claimant's AWW was $232, arguing the best evidence was that claimant's average weekly wage would have been $112.52.

Claimant asks that the Board affirm the Award of the SALJ, except claimant contends the SALJ miscalculated the amount of work disability and that he is entitled to a work disability of 96 percent.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability?

(2) What was claimant's average weekly wage?

FINDINGS OF FACT

Claimant was hired by respondent as a casual employee. He testified that during the interview for the job, he was told he would be working from 5 p.m. to 9 p.m., Monday through Friday, and he would be paid $13 per hour. As part of the hiring process, he was sent for a pre-employment physical, which he passed. On January 31, 2011, claimant went through orientation and training with respondent.

Claimant testified the first day he was called into work was on February 1, 2011.[1] There had been a big snow, and respondent was having trouble getting anyone to come in to work. Claimant testified when he got to work, he was told he could work all the hours he wanted. He believed he could have worked 12 to 16 hours his first night. Claimant was given a truck number and told to get a forklift and go to the end of the dock to find the truck. When claimant found the truck/trailer, there was ice over the seal on the back door of the trailer. He said in order to reach the handle to unlatch the trailer's door he had to squat down almost to the floor and then reach down about six inches below the dock. As he was pulling up on the handle to raise the door, the door suddenly came to a stop. Claimant's feet went out from under him, and he fell onto the concrete, landing on his tail bone. Claimant thought he might have heard a popping sensation, and he had severe pain that went down to his toes and up his back. A coworker helped him up, but claimant could hardly walk. Claimant testified the coworker helped him to his forklift, and he went back to the office and reported the accident to James Guess, respondent's outbound supervisor. Claimant said there was no one available at respondent to take him to the hospital, so someone helped him walk to his truck and he drove himself to the hospital.

[1] Claimant testified his accident occurred on February 1, 2011, but respondent's accident report sets out a date of accident of February 3, 2011. Neither party is disputing that an accident occurred, and neither party is claiming date of accident as an issue.

James Guess is the outbound supervisor for respondent. Mr. Guess testified that one of his job duties is to hire casual employees. A casual employee is an employee who is called the day he or she is needed. Casual employees may work one day or all five days of the week, Monday through Friday. They would begin work at 4 p.m. and normally work until 8 p.m. At times, they may have to work a little longer, but 9:30 p.m. would be the latest any casual employee would work. Casual employees may work up to 20 hours a week, but they are not guaranteed any hours. Casual employees were paid $11.60 per hour with no fringe benefits. Mr. Guess interviewed and hired claimant. Mr. Guess testified claimant was not guaranteed any hours of work.

Attached as an exhibit to Mr. Guess' deposition was a time sheet of one of respondent's employees, Jabari Cambridge. Mr. Cambridge was employed as a casual employee in February 2011. Mr. Guess stated the time sheet accurately reflected the number of hours a casual would typically work. Mr. Guess said that not all casual employees work the same number of hours. Some work more hours and some work fewer hours. Mr. Guess stated if claimant had continued with his employment, he may have worked more, the same, or less than Mr. Cambridge.

On his first day working on the dock,[2] claimant was directed by Mr. Guess to go to the trailer at Door 50. Mr. Guess planned to show claimant how to start on a trailer. Claimant left and Mr. Guess put on his coat. As Mr. Guess was walking to the trailer at Door 50, he met claimant coming to the office. Claimant told Mr. Guess he had hurt his back when he tried to open the door to the trailer. Claimant said his back was hurting and he needed some time off to get feeling better. Mr. Guess said claimant appeared to have trouble walking and was having some pain.

Mr. Guess testified he asked claimant if he wanted any medical treatment, but claimant declined and said he was going to go home. Mr. Guess and claimant then filled out an accident report. The accident report sets out that on February 3, 2011, at about 4:15 p.m., claimant was injured while lifting the door of a trailer when he felt a pull in his right lower back. The accident report indicates claimant required medical treatment. Claimant did not sign the accident report. Mr. Guess said claimant did not want to go to the doctor but wanted notice of the accident put on file.

Mr. Guess later went to the trailer as part of the accident investigation. He saw that the latch had been flipped into an open position. Mr. Guess went to open the door to the trailer, and the door opened right up. The trailer door is the type that is lifted up and it rolls up. Mr. Guess did not have to reach below the dock to lift up the door; the door was even with the dock.

[2] Either February 1, 2011, or February 3, 2011.

Claimant was ultimately authorized by respondent to seek treatment at KU MedWest Occupational Health. He had an MRI that showed he had bulging discs at three levels. He was given a 5 to 15 pound lifting restriction and was sent to physical therapy. Claimant has not worked anywhere since he was hurt at respondent.

Claimant said he still has lower back pain and groin discomfort. He has trouble sleeping at night. His back pain goes down the back of his leg to about 6 inches below his knee. Sometimes his left foot numbs and then shoots up his back to about mid-back. Claimant said he has been taking a lot of pain medication.

Claimant had been disabled before he took the job at respondent. At the time, he was receiving Social Security disability benefits and VA benefits. He had suffered a head injury when he was in the military. He also had cancer that resulted in his having eye surgery, and he is light sensitive and has to wear colored glasses. Claimant had no previous lower back injuries or other problems with his lower back.

Dr. Adrian Jackson, a board certified orthopedic surgeon, was authorized by respondent to be claimant's treating physician. He examined claimant on only one occasion, May 25, 2011. Claimant related a history of working for respondent as a forklift operator. Claimant said he bent over to lift a frozen door on a trailer and experienced pain in his low back. Claimant did not describe any radicular symptoms, and Dr. Jackson said his symptoms sounded muscular in nature. Dr. Jackson performed a physical examination of claimant, which he essentially found to be a normal examination. Dr. Jackson reviewed the results of an MRI scan that had been taken in February 2011. The MRI showed claimant had some degenerative changes in the lumbar spine, but nothing was compressing the neurological structures and nothing appeared acute. All the findings on the MRI scan were longstanding degenerative changes.

Dr. Jackson reviewed records from KU MedWest that showed claimant had back pain, lumbar strain and right lower extremity radiculopathy. The doctors at KU MedWest also noted claimant had tenderness and spasm in the right lumbar paravertebral muscles with decreased range of motion. Dr. Jackson does not dispute claimant had those symptoms at the time he was seen at KU MedWest, but he said those symptoms described a lumbar strain. Dr. Jackson stated claimant was not suffering from those symptoms when he saw claimant, nor were any of Dr. Jackson's findings consistent with radiculopathy. Dr. Jackson stated groin pain can be a lot of things and is not typically radiculopathy.

After Dr. Jackson's examination of claimant, he opined claimant had suffered a lumbar strain that had resolved by the time he was seen. Dr. Jackson stated claimant had very little pain when he was examined. Dr. Jackson did not believe claimant needed any further treatment, but he discussed with claimant things he could do to preserve his back. Dr. Jackson denied giving claimant any restrictions.

On January 23, 2012, at the request of respondent, Dr. Jackson rated claimant as being in AMA *Guides*[3] DRE Category I, which equals a 0 percent impairment for a resolved strain with no documentable objective findings. Dr. Jackson reviewed a task list prepared by Dr. Robert Barnett. Dr. Jackson opined that claimant was able to perform all 36 tasks on the list for a 0 percent task loss.

Dr. Pedro Murati is board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations. He examined claimant on July 12, 2011, at the request of claimant's attorney. Claimant's chief complaints were low back pain, groin pain and numbness in his right buttocks. Claimant had difficulty going down stairs, walking long distances, sitting or driving for long periods of time, and inability to have sex because of low back pain. Claimant gave a history of his accident, stating he was squatting and bent over to reach out below his feet to grab a door handle. The door came up to the level of his feet and then abruptly stopped, and claimant felt something pop in his low back. Claimant said he fell over onto his right side and tried to walk off the pain, but it became worse. Claimant said he felt pain in his low back on his right side and shooting pain down his right upper leg. He reported that his groin pain began four days later when the low back pain subsided with the taking of painkillers.

Dr. Murati reviewed the records of claimant's medical treatment at KU MedWest. Claimant had been seen by a physician assistant, Mandy Scott, several times in February and March 2011, where he was diagnosed with lumbar strain, lumbago, low back pain, and arthritis to the lumbar spine. Dr. Murati also reviewed the records of Dr. Jackson, where it was noted claimant had lower back pain with occasional pain wrapping around his iliac crest and into his bilateral groin regions. Dr. Murati also reviewed the results of claimant's MRI done on February 24, 2011.

Dr. Murati performed a physical examination of claimant. Dr. Murati testified claimant was missing his knee reflexes and had a loss of sensation in the L4 and S1 dermatomes, which was consistent with radiculopathy. Dr. Murati said claimant's physical examination findings were consistent with what he would have expected from the MRI findings. He diagnosed claimant with high lumbar radiculopathy, right inguinal hernia, and right SI dysfunction. He opined that all claimant's diagnoses were a direct result of the work related injury of February 2011.

Dr. Murati gave claimant the following restrictions: In an 8-hour day, claimant should not bend, crouch, crawl or stoop; he should not lift/carry or push/pull more than 10 pounds and that only occasionally; he should rarely ascend or descend stairs or ladders; he should rarely squat; he could occasionally sit, stand, walk and drive; he could frequently lift/carry and push/pull to 5 pounds; and he should alternate sitting, standing and walking.

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Murati reviewed the task list prepared by Dr. Robert Barnett. Of the 36 tasks on the list, he opined that claimant was unable to perform 33 for a 91.67 percent task loss.

Based on the AMA *Guides*, Dr. Murati placed claimant in DRE Lumbosacral Category III for a 10 percent whole person impairment.

Robert Barnett, Ph.D., is a clinical psychologist and also holds credentials in Kansas as a rehabilitation counsel. He interviewed claimant by telephone on September 7, 2011, at the request of claimant's attorney. Dr. Barnett also obtained a Social Security printout on claimant. Using the printout and information obtained from claimant, Dr. Barnett prepared a list of 36 unduplicated tasks claimant performed in the 15-year period before his work-related accident in February 2011. Claimant had 52 different jobs during that 15-year period. Claimant had quit 11 of the 52 jobs during orientation. Claimant did not tell Dr. Barnett that he was a published author. Dr. Barnett said if a person wrote and published a book and received payment or royalties for it, it would be self-employment.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as

long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2010 Supp. 44-511(a) states in part:

> (a)(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

K.S.A. 2010 Supp. 44-511(b) states in part:

> (4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; . . .
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> (5) . . . If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers.

ANALYSIS

1. Impairment

The record contains two opinions on the extent of impairment experienced by claimant. Dr. Murati assessed a 10 percent whole body impairment based upon DRE Lumbosacral Category III of the AMA *Guides.* Dr. Murati's rating report was placed into the record without objection or impeachment. In his report and testimony, Dr. Murati diagnosed radiculopathy. He based his opinions on both outside medical records and testing.

Dr. Jackson initially wrote in a report dated January 23, 2012, that claimant experienced a 0 percent impairment resulting from the work injury. On cross-examination, Dr. Jackson agreed that if claimant had radiculopathy, claimant would have a 10 percent whole body impairment rating based upon the AMA *Guides*. While Dr. Jackson testified generically that none of the points made on cross-examination changed his opinion, the

testimony he provided on cross-examination, basically agreeing with Dr. Murati's assessment of impairment, was not specifically addressed on redirect.

The Board finds that claimant sustained his burden to show that he experiences a 10 percent permanent partial disability to the body as a whole.

2. Work Disability

a. Wage Loss

The claimant testified that he has not worked since the work-related injury. His testimony in this regard is not challenged. As such, the Board must find that claimant has a 100 percent wage loss.[4]

b. Task Loss

Dr. Barnett, the vocational expert, compiled a task list containing what appears to be 36 tasks. Dr. Jackson reviewed the 36 tasks and testified that claimant was physically able to perform all of the listed tasks. Dr. Jackson's testimony relating to his task loss assessment was not challenged on cross-examination.

Dr. Murati reviewed the task list and opined that the claimant experienced a 91.67 percent task loss. Dr. Murati was asked a series of questions, to which the doctor agreed that if the descriptions of the tasks were inaccurate or nonexistent, his opinion regarding task loss would change.

At the Regular Hearing, the claimant was not asked to review and verify the information contained in the task list prepared by Dr. Barnett. There is no supporting testimony for any of the listed tasks except for the testimony of Dr. Barnett that he and claimant compiled the list. Dr. Barnett identified 52 jobs that claimant held in the past. Only 32 of those jobs are listed on the Social Security report. Regarding how he decides which jobs are included in the task list, Dr. Barnett testified:

> Q. [by respondent's attorney] You have identified, I believe, 52 separate jobs that were performed by Mr. Harlan?
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> A. [by Dr. Barnett] Yes.
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> Q. Were all of those jobs contained within Exhibit No. 4, which is the social security printout?

[4] See *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

> A. I believe–well, I'd have to review them both to the see [*sic*]. They were certainly in the social security printout, plus his prepared listed. [*sic*]. I doubt–I would say it's not my practice to include a job that they list if it's not in the social security printout.
>
> Q. So he may have listed some jobs which would be identified in Exhibit No. 5 that you would not include?
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> A. If you laid them down side by side, there may be some jobs that are not consistent. And if they are not consistent, I won't put them in because it meant he had no wages from them.
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> Q. He had quit 11 of the 52 jobs, I believe, during orientation?
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> A. That sounds about right.
>
> Q. You included those?
>
> A. If he was paid. If there was evidence that he received a paycheck on the social security printout.[5]

Two statements are of note in this segment of Dr. Barnett's deposition. First, he testified "it's not my practice to include a job that they list if it's not in the social security printout." Second, Dr. Barnett testified he would only include a job "[i]f there was evidence that he received a paycheck on the social security printout." Seventeen of the listed tasks are related to jobs that are not included in the Social Security report. The seventeen tasks include 11, 12, 13, 14, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36. Task number 33 doesn't even identify the employer. The employers not found in the Social Security report include Ford Motor Company, A&E Tool & Die, SPD Solid Surface, Keebler, Hoover Universal, Conopo, Inc., True Green Chemlawn, Deffenbaugh, and Sac & Fox Casino.

The Board finds the inclusion of these tasks to be inconsistent with Dr. Barnett's testimony and that claimant has failed to provide sufficient foundation. Dr. Barnett's task list will not be given any weight. It is uncommon to exclude a task list in its entirety, but in this case almost half of the tasks are included contrary to Dr. Barnett's normal protocol of including jobs where there is evidence that the person received a paycheck on the social security readout. The Board finds that claimant experiences a 0 percent task loss.

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[5] Barnett Depo. at 11-12.

3. Average Weekly Wage

Claimant was employed as a casual employee on a part-time basis. Mr. Guess testified that casual workers can work up to 20 hours per week, but they are not guaranteed work. Claimant testified that he was told he would work 20 hours per week at the rate of $13 per hour. The Board finds that claimant was a part-time hourly employee pursuant to K.S.A 2010 Supp. 44-511(a)(4).

The method of determining the average weekly wage of a part-time hourly employee is found in K.S.A 2010 Supp. 44-511(b)(5):

> If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers.

The respondent, through the testimony of James Guess, provided evidence of what they paid an employee for performing similar services. The wage statement of Jabari Cambridge was offered into the record by respondent. Claimant's attorney objected on the basis of relevance and foundations. K.S.A 2010 Supp 44-511(b)(5) makes the wage statement relevant. Mr. Guess testified that the exhibit reflected the number of hours a casual worker would typically work and that the exhibit was a true and accurate copy of Cambridge's time detail. The Board finds that the document is relevant and that sufficient foundation exists to allow admission into the record as a business record of the respondent.

Mr. Cambridge's time record covers a period from August 1, 2010, through May 26, 2011, which exceeds 26 weeks. Mr. Cambridge worked 202.87 hours between November 25, 2010 and May 26, 2011, which is a period of 26 weeks. Mr. Cambridge was not paid for two weeks during this period. At the rate of $11.60 per hour, Mr. Cambridge earned $2,353.29 during the 24 weeks that he worked. This amount divided by 24 weeks worked equals an average weekly wage of $98.05.

CONCLUSION

Based upon the foregoing, the Board finds:

1. That claimant suffers from a 10 percent permanent partial impairment to the whole body;

2. That claimant experiences a 100 percent wage loss and a 0 percent task loss, resulting in a work disability of 50 percent;

3. That claimant's average weekly wage is $98.05, with a compensation rate of $65.37 per week.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry R. Shelor dated August 24, 2012, is modified to reflect a work disability of 50 percent and an average weekly wage of $98.05.

Claimant is entitled to 15.86 weeks of temporary total disability compensation at the rate of $65.37 per week or $1,036.77 followed by 207.07 weeks of permanent partial disability compensation at the rate of $65.37 per week or $13,536.17 for a 50 percent work disability, making a total award of $14,572.94.

As of February 11, 2013, there would be due and owing to the claimant 15.86 weeks of temporary total disability compensation at the rate of $65.37 per week in the sum of $1,036.77 plus 89.71 weeks of permanent partial disability compensation at the rate of $65.37 per week in the sum of $5,864.34 for a total due and owing of $6,901.11, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $7,671.83 shall be paid at the rate of $65.37 per week for 117.36 weeks or until further order of the Director.

The Board finds that there has been an overpayment of temporary total disability benefits in the amount of $153.05. Pursuant to K.S.A. 44-534a(c), the credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING OPINION

The undersigned Board Members respectfully dissent from the majority ruling.

The majority of the Board concludes that 17 of claimant's 36 unduplicated tasks, as identified by Dr. Barnett, the only vocational expert to testify in this matter, are unreliable because: (1) they were not included in employments listed on a social security print-out; and (2) Dr. Barnett went against his typical approach of only including tasks related to jobs listed in a social security print-out.[6] The majority also has concerns about the foundation for such task list, presumably whether claimant testified as to the accuracy of the task list.

As an initial observation, these Board Members are unaware of any prior Board decisions where a task list or a physician's task loss opinion was wholly discounted because a vocational expert identified tasks that were not on a social security print-out and/or where a vocational expert deviated from his or her normal operating procedure. Additionally, there is no statutory or evidentiary requirement that claimant testify to the accuracy of the task list.

K.S.A. 44-510e(a) requires that task loss must be based on "the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident." Excluding tasks from jobs not listed on a social security print-out would impermissibly exclude tasks performed in the 15 years before claimant's accident. Simply because a job is not on a social security print-out does not automatically mean that job is not substantial gainful employment.

While claimant's task list has many problems, neither party inquired about the accuracy of the task list that claimant formulated with Dr. Barnett. Respondent's cross-examination of claimant did note that claimant made a one-time, $300 royalty for publishing a book, that he has a trademark patent for some sort of trinket and he makes wood plaques or medallions for cancer survivors. The last two activities, which resulted in no income, can not be confused with substantial gainful employment. The respondent also used Dr. Barnett's task list to obtain a task loss opinion from Dr. Jackson. Doing so would seemingly discredit the notion that the entire list is invalid and worthy of being disregarded.[7]

These Board Members would exclude from the task list any tasks associated with claimant showing up for a job only to quit during or shortly after orientation. Such "tasks" would not be substantial and gainful employment. These Board Members would not

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[6] Dr. Barnett testified that jobs and earnings not listed on the social security print-out meant claimant was not paid for such work. That premise is not necessarily correct, as many workers are paid cash and their employers provide no earnings documentation to the government.

[7] Of course, these Board Members recognize that any task list presented to Dr. Jackson would have resulted in a 0% task loss opinion, at least in this case, insofar as Dr. Jackson provided no restrictions.

include in the task list any tasks linked to jobs where claimant was merely paid a nominal sum, which is not synonymous with substantial gainful employment. These Board Members would also exclude any task where there is no proof claimant engaged in such task, such as unloading trucks for respondent.

These Board Members also have concerns with the descriptions of the tasks and whether claimant may perform such tasks. Why does task 4 - operate forklift - have a 40-pound lifting requirement, while task 2 - operate forklift - does not? A 20-pound lifting requirement for assembling umbrellas (task 5) seems excessive, as does pushing/pulling 100 pounds to make change for casino customers (task 23), as well as lifting 30 pounds to change light bulbs (task 24). Other tasks seem so benign that they should be within claimant's task-performing ability, such as walking as a security guard (task 7), data entry on a computer (task 8), scanning ID cards at a casino (task 11), lifting no more than two pounds while cooking (tasks 12-13), cleaning plastic bottles (task 19), lifting one pound to assemble boxes (task 21) and replacing two-pound filters for Hoover (task 27). However, there was no cross-examination or impeachment of claimant or Dr. Barnett regarding the accuracy of these tasks.

While these Board Members have no concerns about eliminating tasks not supported by the evidence, the remaining 19 tasks identified by Dr. Barnett are on the social security print-out, and his including them in the task list is consistent with his typical approach of formulating a task list. These Board Members are not convinced as to the rationale of tossing away the entire task list based on concerns about the legitimacy of *some* of the tasks, where the legitimacy of more than one-half of the tasks is apparently not in dispute by the majority of the Board. Essentially, the majority of the Board is throwing out seven good eggs out of a dozen because five of the eggs were broken.

Respondent is correct that the Board has previously ruled that a claimant failed to prove task loss where claimant failed to tell a vocational expert about a job, which made calculating the precise task loss impossible without "pure speculation."[8] However, more recently in *Petsinger*,[9] the Board arrived at the opposite conclusion where a job was omitted from a task list, even though there was serious disagreement as to the accuracy of task lists generated by experts hired by both sides. In such case, the omissions and errors in the task lists did not invalidate the task lists. The Board simply added the omitted job as a single task and recalculated two physicians' task loss opinions based on the added task.

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[8] *Voorhies v. Cobalt Boats*, No. 1,000,243, 2004 WL 3094633 (Kan. WCAB Dec. 22, 2004).

[9] *Petsinger v. Chet's Lock & Key*, No. 1,045,680, 2010 WL 769953 (Kan. WCAB Feb. 15, 2010).

The Kansas Court of Appeals also addressed this issue. In *Medlin*,[10] the Board ruled that a claimant failed to prove any task loss because: (1) Mr. Medlin provided an employment history to his vocational expert, Mr. Dreiling, that was different than his regular hearing testimony; and (2) Dreiling's task list was too broad. Medlin had failed to tell Dreiling about a flatwork job he had for three to four months and erroneously told Dreiling that he operated a bar and grill from 1989 to 1994 instead of 1989 to 1993. The Kansas Court of Appeals stated:

> Although there are discrepancies in Medlin's testimony and Dreiling's report, the discrepancies were not significant. Medlin was honest about the mistakes in the report, and there is no evidence that he intentionally misrepresented his work history to Dreiling. Contrary to the findings of the Board, Medlin provided a very detailed report, which outlined and described the work tasks. Rather than finding that Medlin failed to meet his burden of proof regarding work task loss, the Board should have accepted the uncontroverted evidence as a basis for its findings concerning disability. The Board then could have made adjustments and corrections as the Board deemed appropriate, instead of completely disregarding the expert's opinion concerning work task loss.
> . . . .
>
> The Board arbitrarily disregarded uncontroverted evidence that established work task loss. A zero percent task loss is not appropriate in light of the vocational expert's opinion, and the matter should be remanded for further proceedings to determine the appropriate work task loss.[11]

Additionally, the Board is duty bound to follow the mandate of *Bergstrom*[12] that plainly-worded workers compensation statutes must be interpreted literally.[13] Work disability under K.S.A. 44-510e(a) is:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

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[10] *Medlin v. Douglas County Public Works*, No. 83,240, 4 P.3d 1188 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

[11] *Id.*, slip. op. at 6-7.

[12] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[13] *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

Simply throwing out the 17 questionable tasks, as well as the 19 remaining tasks, has the effect of actually *not* determining "the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident."

The majority never indicated what permanent restrictions, if any, claimant should follow.[14] These Board Members would find Dr. Jackson's lack of restrictions too conservative and Dr. Murati's restrictions too liberal and that claimant's restrictions should be in between the two extremes. Further, Dr. Murati's postural restrictions against bending, crouching and stooping seem inappropriate when the claimant is a motorcycle rider.

These Board Members would find that claimant proved some percentage of task loss, perhaps by averaging the testifying physicians' opinion of task loss when only including reliably-proven tasks and excluding questionable tasks and tasks not associated with substantial gainful employment.

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BOARD MEMBER

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[14] Granted, calculating task loss is a moot point if the entire list is not considered as good evidence by the Board.